Praccom Sdn Bhd v Malaysian Timber Council & Anor

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22–293 OF 2006
VAZEER ALAM MYDIN JC
1 OCTOBER 2010

Civil Procedure — Striking out — Application to strike out action — Whether action against first defendant should be struck out — Whether first defendant ought to have been named as party to action — Whether plaintiff raised serious questions to be tried — Whether too late for first defendant to apply to strike out plaintiff's action — Rules of the High Court 1980 O 18 r 19

Pusat Teknologi Perabot Utara Sdn Bhd ('the second defendant') was a company formed to operate a skills training centre to promote the timber industry in Malaysia while the first defendant was at all material times a majority shareholder of the former, holding 50% of the shares in the second defendant company. For all intents and purposes the second defendant as the beneficial owner of a piece of land situated in Pulau Pinang valued at RM1.25m ('the land'), dealt with the land as lawful owner and proprietor. When the second defendant erected a factory building on the land ('the factory') but did not pay for the costs of constructing the factory legal action was taken against it. In order to avoid being wound up the second defendant approached the plaintiff to purchase its machinery in the factory. The plaintiff agreed to this request provided it was allowed to rent the land and factory. The plaintiff and the second defendant then entered into a sale and purchase agreement relating to the purchase of the machinery in the factory and a tenancy cum option to purchase agreement ('TOPA') dated 25 January 2002. Under the terms of the TOPA, and in particular cl 9, the plaintiff was entitled to be given the first option to purchase the land in the event the second defendant wished to sell the same. Thereafter the plaintiff made several offers to purchase the land but these offers were rejected by the second defendant. The plaintiff then learned that the second defendant had, without the plaintiff's knowledge, entered into a sales and purchase agreement ('the SPA') to sell the land to the first defendant for RM122,179,59. The plaintiff entered a private caveat over the land to protect its interest under the TOPA, namely its right to the first option to purchase the land. At the same time the plaintiff served on the defendants a notice of demand claiming, inter alia, that the first and/ or second defendants sell the land to the plaintiff at the price of RM122,179,59. When the defendants failed to comply with the notice the plaintiff filed the present action against the two defendants wherein it sought a declaration that the SPA entered into between the defendants in respect of land be declared void; a declaration that the first and/or second defendants had breached the

terms of the TOPA and specific performance of the obligations of the second defendant pursuant to cl 9 of the TOPA. The plaintiff relied on the TOPA and in particular cl 9 thereof in its case against the defendants. The first defendant submitted that the plaintiff's claim ought to be struck out as there was no privity of contract as between the plaintiff and the first defendant; and that the sale and transfer of the land from the second defendant to the first defendant was not a sale but an internal arrangement between the shareholders of the second defendant flowing from the second defendant ceasing its business operations. This was the first defendant's application to strike out the plaintiff's action against it. The plaintiff stated that its cause of action accrued from the breach of the contract by the second defendant and that the first defendant was complicit in that breach. The plaintiff argued that it was not merely a tenant but an option holder and that by virtue of being an option holder it had a caveatable interest in the land. It was also the plaintiff's argument that the first defendant as the majority shareholder of the second defendant had knowledge of the TOPA, in particular cl 9 thereof, which meant that it was not a bona fide purchaser for value without notice. The plaintiff thus contended that the title the first defendant had obtained vide the SPA was defeasible.

Held, dismissing the first defendant's striking out application with costs:

(1) Since any order made in this action would have a direct bearing on the rights and interests of the first defendant it was only proper that all parties who would be potentially affected by any order of the court be made parties to this action. Further, as declaratory reliefs are sought in this case, it is trite law that all parties who would be potentially affected by any such declarations ought to be before the court and named as parties (see para 39).

(2) The plaintiff's claim had raised serious questions to be tried and was neither frivolous, vexatious nor an abuse of the court process. This was evident from the various affidavits filed by both parties (see para 40).

(3) The first defendant had filed unconditional appearance, a lengthy defence and counterclaim, as well as an application for security for costs which was dismissed by the court. After having taken such positive steps in the proceedings it would be too late in the day for the first defendant to invoke O 18 r 19 of the Rules of the High Court 1980 and apply to strike out the plaintiff's claim as frivolous or vexatious or an abuse of the court process (see para 40).

[Bahasa Malaysia summary

Pusat Teknologi Perabot Utara Sdn Bhd ('defendan kedua') adalah syarikat yang ditubuhkan untuk menjalankan pusat latihan kemahiran bagi mempromosikan industri balak di Malaysia sementara defendan pertama adalah pada kesemua masa material pemegang saham majoriti defendan kedua,

memegang 50% saham di dalam defendan kedua. Untuk kesemua niat dan tujuan defendan kedua adalah pemilik benefisiari sebidang tanah yang terletak di Pulau Pinang yang bernilai RM1.25 juta ('tanah'), berurusan dengan tanah sebagai pemilik sah dan tuan punya. Apabila defendan kedua membina bangunan kilang di atas tanah tersebut ('kilang') tetapi tidak membayar untuk kos pembinaan kilang, tindakan undang-undang diambil ke atasnya. Supaya tidak digulung defendan kedua menawar kepada plaintif untuk membeli mesinnya yang berada di dalam kilang. Plaintif bersetuju kepada permintaan ini jika ia dibenarkan menyewa tanah dan kilang. Plaintif dan defendan kedua memasuki perjanjian jual beli berkaitan pembelian mesin di dalam kilang dan penyewaan merangkap perjanjian opsyen untuk membeli ('perjanjian') bertarikh 25 Januari 2002. Di bawah terma-terma perjanjian, dan terutamanya klausa 9, plaintif berhak diberi opsyen pertama untuk membeli tanah tersebut jika defendan kedua berhasrat untuk menjualnya. Plaintif kemudiannya membuat beberapa tawaran untuk membeli tanah tersebut tetapi tawaran-tawaran ini ditolak oleh defendan kedua. Plaintif kemudiannya mendapat tahu bahawa defendan kedua telah, tanpa pengetahuan plaintif memasuki perjanjian jual beli ('PJB') untuk menjual tanah tersebut kepada defendan pertama untuk sebanyak RM122,179,59. Plaintif memasuki kaveat persendirian ke atas tanah tersebut untuk memelihara kepentingan di bawah perjanjian, iaitu haknya kepada opsyen pertama untuk membeli tanah tersebut. Pada masa yang sama plaintif menyerahkan kepada defendan-defendan notis tuntutan menuntut, antara lain, bahawa defendan-defendan pertama dan/atau kedua menjual tanah tersebut kepada plaintif pada harga RM122,179,59. Apabila defendan-defendan gagal mematuhi notis tersebut plaintif memfailkan tindakan ini terhadap kedua-dua defendan di mana ia memohon perisytiharan bahawa PJB yang dimasuki di antara defendan-defendan berkaitan tanah diisytiharkan tidak sah; perisytiharan bahawa defendan-defendan pertama dan/atau kedua telah memungikiri terma-terma perjanjian dan pelaksanaan spesifik tugas-tugas defendan kedua berikutan klausa 9 perjanjian. Plaintif bergantung ke atas perjanjian tersebut terutamanya klausa 9 tersebut dalam kesnya terhadap defendan-defendan. Defendan pertama berhujah bahawa tuntutan plaintif patut dibatalkan kerana tidak terdapat priviti kontrak di antara plaintif dan defendan pertama; dan bahawa jualan dan pindahmilik tanah tersebut daripada defendan kedua kepada defendan pertama bukan jualan tetapi penyusunan dalaman di antara pemegang-pemegang saham defendan kedua berpunca daripada defendan kedua berhenti operasi perniagaannya. Ini adalah permohonan defendan pertama untuk membatalkan tindakan plaintif terhadapnya. Plaintif menyatakan bahawa kausa tindakannya terakru daripada kemungkiran kontrak oleh defendan kedua dan bahawa defendan pertama terlibat di dalam kemungkiran tersebut. Plaintif berhujah bahawa ia bukan semata-matanya penyewa tetapi pemegang opsyen dan bahawa memandangkan sebagai pemegang opsyen ia mempunyai kepentingan kaveat di dalam tanah tersebut. Ia juga adalah hujahan plaintif bahawa defendan

pertama sebagai pemegang majoriti defendan kedua mempunyai pengetahuan mengenai perjanjian tersebut, terutamanya klausa 9, yang bermaksud bahawa ia bukan pembeli bona fide untuk nilai tanpa notis. Plaintif oleh itu berhujah bahawa hak milik yang diperolehi oleh defendan pertama melalui PJB adalah boleh disangkal.

Diputuskan, menolak permohonan pembatalan defendan pertama dengan kos:

(1) Memandangkan apa-apa perintah yang dibuat di dalam tindakan ini akan mempunyai kesan terus atas hak dan kepentingan defendan pertama ia hanyalah betul bahawa kesemua pihak-pihak yang akan secara berpotensi terjejas oleh mana-mana perintah mahkamah dimasukkan sebagai pihak-pihak dalam tindakan ini. Selanjutnya, memandangkan relief perisytiharan dipohon di dalam kes ini, ia adalah undang-undang nyata bahawa kesemua pihak yang akan secara berpotensi terjejas oleh perisytiaran-perisytiharan tersebut patut dibuat di hadapan mahkamah dan dinamakan sebagai pihak-pihak (lihat perenggan 39).

(2) Tuntutan plaintif telah membangkitkan persoalan-persoalan serius yang boleh dibicarakan dan kedua-duanya tidak remeh, menyusahkan dan juga bukan penyalahgunaan proses mahkamah. Ini jelas daripada beberapa afidavit yang difailkan oleh kedua-dua pihak (lihat perenggan 40).

(3) Defendan pertama telah memfailkan kehadiran tidak bersyarat, pembelaan yang panjang dan tuntutan balas, dan juga permohonan untuk sekuriti untuk kos yang mana ditolak oleh mahkamah. Selepas mengambil langkah positif sebegitu di dalam prosiding ia akan menjadi terlalu lambat untuk defendan pertama membangkitkan A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 dan memohon untuk membatalkan tuntutan plaintif sebagai remeh-temeh atau menyusahkan atau penyalahgunaan proses mahkamah (lihat perenggan 40).]

Notes

For cases on application to strike out action, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7482–7494.

Cases referred to

Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors [2000] 2 MLJ 417; [2000] 2 CLJ 457, CA (refd)

Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors [1995] 1 MLJ 241; [1995] 1 AMR 549, SC (refd)

Anchorage Mall Sdn Bhd v Irama Team (M) Sdn Bhd & Ors [2001] 2 MLJ 520; [2001] 7 CLJ 313, HC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1993] 3 MLJ 36, SC (refd)
Bank of Commerce (M) Bhd v Lim Kesang & Ors [2006] 5 CLJ 17, HC (refd)
Brown v Gould and Others [1972] 1 Ch 53, HC (refd)
Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (suing as legal representative of DYMM Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang di Pertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors [2005] 4 MLJ 506; [2005 2 CLJ 688, HC (refd)
Dorothy Jones & Anor v Kim Seong Tan & 2 Ors (1999) NSWSC 648 (refd)
Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications [1995] 3 MLJ 665, HC (refd)
Koh Thong Chuan v The Official Assignee of the property of Koh Liang Hee, a bankrupt and another appeal [2003] 1 MLJ 113, CA (refd)
Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano [1997] 1 MLJ 94, FC (refd)
Lian Keow Sdn Bhd v Chelliah Paramjorthy [1982] CLJ (Rep) 522, HC (refd)
Lim Kee Gee & Ors v Chung Wah Emporium Sdn Bhd [1985] CLJ (Rep) 537, HC (refd)
Low Lian Koon & Anor v Meng Fong Realty Sdn Bhd & Anor [2004] 8 CLJ 391, HC (refd)
Mohamed Nazri Abdul Aziz v Abu Samah Hj Wahab & Ors [2005] 8 CLJ 388, HC (refd)
Ong Chat Pang & Anor v Valliapa Chettiar [1971] 1 MLJ 224, FC (refd)
Southern Region ltd v Wellington hardware & Timber Pty Ltd (10917 of 2009; 2010 VSC 95) (refd)
Wong Yew Kwan v Wong Yu Ke & Anor [2009] 2 MLJ 672; [2010] 2 CLJ 703, CA (refd)
Yong Joo Lin & Ors v Fung Poi Fong [1941] MLJ 63 (refd)

Legislation referred to

National Land Code s 340(2), (4)(b),
Rules of the High Court 1980 O 18 r 19(1) (b), (d)

Karin Lim Ai Ching (Presgrave & Matthews) for the plaintiff.
WE Ong (Sharizat Rashid & Lee) for the first defendant.

Vazeer Alam Mydin JC:

[1] This is an application by the first defendant to strike out the plaintiff's claim pursuant to O 18 r 19(1)(b) and/or (d) of the Rules of the High Court 1980 'RHC' on the following grounds, namely:

(a) that the plaintiff's application is defective and invalid for the plaintiff does not have any legal nexus or privity of contract with the first defendant;

(b) the plaintiff's action is scandalous, frivolous or vexatious; or

(c) that the action is an abuse of the process of the court.

[2] The plaintiff's claim is for breach of contract entered into between the plaintiff and the second defendant. The plaintiff avers that the first defendant is complicit in the breach complained by the plaintiff. The writ was issued on 26 May 2006 and the defendants had entered unconditional appearance on 6 June 2006. Thereafter, on 5 July 2006 the defendants filed their defence and counter claim. Then on 22 August 2006 the first defendant filed a summons in chambers (encl 13) to strike out the plaintiff's claim. Affidavits were exchanged between the parties and written submissions were filed. I heard further oral arguments and dismissed the first defendant's application as in encl 13 with cost. This is my grounds for that decision.

BACKGROUND FACTS

[3] The second defendant company was formed primarily to operate a skills training centre to promote the timber industry in the country and in particular in the north of the Peninsula and had as its shareholders:

(a) the first defendant — 50%;

(b) the Penang Regional Development Authority ('PERDA') — 25%;

(c) Perbadanan Pembangunan Pulau Pinang ('PDC') — 6.25%;

(d) Perbadanan Kemajuan Ekonomi Negeri Perlis — 6.25%;

(e) Perbadanan Kemajuan Negeri Perak — 6.25%; and

(f) Perbadanan Kemajuan Negeri Kedah — 6.25%.

[4] A shareholders agreement dated 27 February 1997 ('shareholders agreement') was entered into by the above shareholders. All shareholders, including the first defendant, had representation in the second defendant's board of directors.

[5] PERDA was the owner of a piece of land known as PT Lot No 2940, Mukim 4, Daerah Seberang Perai Selatan, Pulau Pinang, held under suratan hakmilik sementara no HS(D) 6714 ('the land'). Pursuant to cl 4.3 of the shareholders agreement, PERDA had injected the land valued at RM1,250,000 into the second defendant as PERDA's share of equity contribution in the second defendant company. Though PERDA remained as the registered proprietor of the land, the beneficial owner of the land was the second defendant and PERDA was merely a bare trustee. For all intends and purpose the second defendant dealt with land as lawful owner and proprietor.

[6] The second defendant proceeded to erect a factory building on the land for the purposes of the skills training centre and the premises had a business address known as Plot A001, Perkampongan Perabot Sungai Baong, 14200 Sungai Bakap, Seberang Perai Selatan, Pulau Pinang ('the factory'). A

[7] The second defendant had failed to settle monies owed by it to one Focus Engineering Sdn Bhd being the cost of erecting a factory building on the said land. Legal action was taken and subsequently winding up proceedings was commenced against the second defendant by Focus Engineering Sdn Bhd. To avoid from being wound up, the second defendant had approached the plaintiff to purchase the machineries belonging to the second defendant in the factory which had been fixed to the said land. The plaintiff had agreed to purchase the machinery provided it was allowed to rent the said land together with the factory erected on it. The plaintiff had sought security of tenure in view of the huge investment it will have to undertake. The second defendant agreed to the plaintiff's request. As a result, the following agreements were entered into between the second defendant and the plaintiff: B C D

(a) a sale and purchase agreement relating to the purchase of the said machineries, and

(b) a tenancy cum option to purchase agreement ['TOPA') dated 25 January 2002. E

[8] The plaintiff asserts that consistent with the assurance of security of tenure, the following clauses were incorporated into the TOPA: F

(a) Clause 8: This enables the plaintiff to renew the tenancy of the said land 3 times for a combined period of 9 years, and

(b) Clause 9: This entitles the plaintiff to be given the first option to purchase the said land in the event the second defendant wishes to sell the same. G

[9] The first defendant was fully aware of the TOPA and its terms for there are letters exhibited in the affidavits which indicate the involvement of the first defendant in the negotiations leading to the execution of the TOPA. The tenancy was also endorsed on the issue document of title to the land pursuant to the provisions in the National Land Code ('NLC'). H

[10] Clauses 8(a), (b) and (c) of TOPA allows the tenancy to be renewed upon the same terms and conditions, which includes the option to purchase. Therefore, the option to purchase is applicable throughout the period of tenancy and not just to the first term of the tenancy but also to the renewed terms as well. I

[11] By letter dated 19 August 2002, the second defendant informed the plaintiff that the second defendant had intention to dispose the land and factory building. The then market value of the property had been valued at RM2.3m by Messrs Jalil & Co and the second defendant invited the plaintiff to make an offer to purchase the land and building. The plaintiff made an offer of RM1m but it was rejected by the second defendant.

[12] Then by letter dated 13 December 2002, the second defendant offered to sell the land and building for the sum of RM2m but it was not accepted by the plaintiff. Some two years later through a letter from its solicitors dated 10 January 2005, the plaintiff informed the second defendant that it was willing to purchase the land and building and made a fresh offer of RM1.2m on 14 May 2005 but this offer was also rejected by the second defendant.

[13] The plaintiff alleges that without the knowledge of the plaintiff, vide a sale and purchase agreement ('S&P') dated 7 November 2005, the second defendant had sold the said land and building to the first defendant for only RM122,179.59 without offering to sell at the same price to the plaintiff as expressly provided in cl 9 of TOPA.

[14] On 14 February 2006, upon learning of the above S&P, the plaintiff entered a private caveat over the said land in order to protect its interest based on TOPA, in particular its rights as provided under cl 9 of the TOPA. The plaintiff then issued notices of demand to the first and second defendants on 21 April 2006 to claim, inter alia, that the first defendant sell the said land to the plaintiff at the price of RM122,179.59 within seven days from the date of the said notice failing which, the plaintiff will apply to the court for a declaration that the S&P is null and void and an order for specific performance of the obligations of the second defendant to sell the said land to the plaintiff at the price of RM122,179.59 as provided for in cl 9 of TOPA. The first and second defendant did not comply with the demands made vide the said notices.

[15] The plaintiff then filed this present action and the reliefs sought, inter alia, are:

(a) a declaration that the S&P dated 7 November 2005 entered into between the first and second defendants in respect of the said land is null and void and of no effect;

(b) a declaration that the first and/or the second defendant had breached the terms and conditions of TOPA dated 25 January 2002 entered into between the plaintiff and the first defendant;

(c) a declaration that the first defendant holds the said land on trust for the plaintiff;

(d) specific performance of the obligations of the second defendant pursuant to cl 9 of TOPA;

(e) specific performance of the obligations of the second defendant to make an offer to the plaintiff to sell the said land for the sum of RM122,179.59 as provided for under cl 9 of TOPA; and

(f) alternatively, the first defendant's name be removed from the registered title and that the second defendant transfer the said land to the plaintiff.

THE FIRST DEFENDANT'S SUBMISSION

[16] Counsel for the first defendant submits that the plaintiff's claim ought to be struck out as there is absolutely no privity of contract between plaintiff and the first defendant. The TOPA is between the plaintiff and the second defendant and does not concern the first defendant. The first defendant further submits that the sale and transfer of the land from the second defendant to the first defendant is not a sale within the intent, meaning and spirit of cl 9 of the TOPA but is in fact an internal arrangement between the shareholders of the second defendant flowing from the ceasing of the second defendant's business operations. Under this internal arrangement, the first defendant took over the shares of the other shareholders and the sum of RM122,179.59 stated as the purchase price for the land is in fact the contra payment of a debt owed by the second defendant to PERDA. Therefore, under the circumstance cl 9 of the TOPA does not come into effect.

[17] Further, the first defendant submits that after becoming the registered owner of the land, the first defendant had offered to enter into a fresh tenancy agreement with the plaintiff; which offer was rejected by the plaintiff. In this regard the first defendant relies on the judgment of Abdul Malik Ishak J (now JCA) in the case of *Low Lian Koon & Anor v Meng Fong Realty Sdn Bhd & Anor* [2004] 8 CLJ 391where in relation to a similar situation His Lordship held that:

> It was as clear as crystal that the second defendant was not a party to the tenancy agreement entered between the plaintiffs and the first defendant. A contract cannot, as a general rule, confer contractual rights or impose contractual obligations arising under it on any person except the parties to it. The parties to the contract must necessarily be the persons who signed the agreement. In *Kepong Prospecting Ltd & Ors v Schmidt* [1968] 1 MLJ 170; [1968] AC 810, a third party made a claim to enforce a contract under the Malaysian law whereby consideration need not move from the promisee. In rejecting the claim, the Privy Council said (see p 826 of the report):
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> It is true that s 2(d) of the Contracts Ordinance gives a wider definition of 'consideration' than that which applies in England particularly in that it enables consideration to move from another person than the promisee, but the appellant

was unable to show how this affected the law as to enforcement of contracts by third parties. It can be surmised from the decision of the Privy Council that the doctrine of privity is distinct from the rule that consideration must move from the promisee.

Put in another way, a person could not enforce a contract to which he was not a party (*Tweddle v Atkinson* (1861) 1 B & S 393; *Green v Russell* [1959] 2 QB 226; and *Beswick v Beswick* [1968] AC 58). Here, the second defendant was not a party to the tenancy agreement signed between the plaintiffs and the first defendant. In addition to that no novation agreement was signed between the plaintiffs and the second defendant and the first defendant. What is a novation? It is a term taken from the Roman law and it arises where two contracting parties agree that a third, who must also agree, shall stand in relation to either of them to the other. In short, with the consent of both the contracting parties, all contracts of any kind may be transferred. It is a new contract and it is essential that the consent of all parties shall be obtained (*Rasbora Ltd v JCL Marine Ltd* [1977] 1 Lloyd's Rep 645; *Damon Compania Naviera SA v Hapag-Lloyd International SA (The Blankenstein)* [1985] 1 WLR 435; and *The Aktion* [1987] 1 Lloyd's Rep 283, 310 to 311). Bereft of the novation agreement, the plaintiffs originating summons in end. (1) stood on flimsy ground and it must fail in limine.

Now, the second defendant is not only the purchaser of the premises, it is also the registered proprietor. No endorsement of the tenancy agreement has ever been made on the register document of title. Consequently, the tenancy agreement was not protected and it was unenforceable against the second defendant. Although the terms and conditions of the tenancy agreement were worded in this way:

This Agreement shall be binding upon the respective heirs, personal representatives, successors in title of the parties hereto and permitted assigns of the tenant.

Yet, the plaintiffs had no cause of action against the second defendant. *Halsbury's Laws of Malaysia*, at Vol 8, at p 562 carries the following passage which merits reproduction. It is this:

As an unendorsed tenancy only creates a personal interest, where there is a binding contract between landlord and tenant, any protection given will operate only against the proprietor who granted the tenancy, unless it is possible to make the successor to the landlord a constructive trustee.

The first defendant's counsel submits that this case is on all fours with the present case and the plaintiff has no cause of action against the first defendant; and therefore, the plaintiff's claim being misconceived in law ought to be struck off.

[18] The first defendant also submits that since the plaintiff had refused to enter into a fresh tenancy agreement, the plaintiff is merely a monthly tenant or a tenant at will. Accordingly, the tenancy can be terminated and the first defendant as the present registered owner of the land has terminated the tenancy.

[19] The first defendant also argues that the first defendant's title to the land is indefeasible under the provisions of s 340(2) of the National Land Code (NLC) and relies on the case of *Wong Yew Kwan v Wong Yu Ke & Anor* [2009] 2 MLJ 672; [2010] 2 CLJ 703 where Gopal Sri Ram JCA (later FCJ) had this to say:

> In my judgment the learned judge was entirely correct in striking out the appellant's pleading as being plainly and obviously unsustainable. Both principle and authority favour her decision. First the principle. It is to be found in s 340(1) of the National Land Code to which she adverted in her judgment. That section immunises the title of a registered proprietor from impeachment save in the limited circumstances that are housed in sub-s (2), namely, registration that has been occasioned by fraud or forgery or by an insufficient or void instrument. In the present case, the appellants sought to rely on the fraud exception. But, as correctly pointed out by the learned judge, mere general allegations of fraud are insufficient to constitute a pleaded case of fraud.

Counsel for the first defendant contends that the plaintiff has failed to plead any of the circumstances in s 340(2) of the NLC which may be relied upon to challenge the first defendant's title. Therefore, the plaintiff is precluded from relying on this provision of the law. Counsel also submits that the plaintiff cannot rely on s 340(4)(b) of the NLC which retains the power of the court to determine any title or interest in land by operation of law. This s 340(4)(b), argues the first defendant, can only operate together with another Act of Parliament and not on its own. For that proposition counsel relies on the case of *Koh Thong Chuan v The Official Assignee of the property of Koh Liang Hee, a bankrupt and another appeal* [2003] 1 MLJ 113 at p 127 where Haidar JCA (later CJM) held:

> With respect, I agree with the contention of counsel for the second appellant that the learned judge erred in applying s 340(4)(b) of the NLC as having determined the bankrupt's title from the time of the alleged fraudulent conveyance, that is, 26 March 1991. Section 340(4)(b) is a savings provision and cannot operate by itself to determine any title or interests in land. It is the operation of s 340(4)(b) which permits the determination of title or interest in land by operation of law as in this case, the Bankruptcy Act 1967. It would appear that without s 340(4) of the NLC no registered title or interests are defeasible save for the instances set out in s 340(2) of the NLC.

THE PLAINTIFF'S SUBMISION

[20] TOPA is the basic Agreement relied on by the plaintiff in its case against the first and second defendants. The main clauses in the TOPA relied on by the plaintiff are as follows:

(a) Clause 8(a): Provided that the Tenant shall have punctually above and observed all its obligations and covenants herein this Agreement the Landlord hereby

expressly agrees that the tenant shall have an option to renew this Tenancy for a further term of thirty-six (36)months (hereinafter referred to as "the Second Term") effective immediately upon the expiry of the existing tenancy at a rental of Ringgit Malaysia Two Thousand and Five Hundred (RM2,500.00) per month and conditions as provided herein which said option shall be exercised by the Tenant by notice in writing to the Landlord at least one (1) month before the expiration of the term hereby created.

(b) Clause 9: In the event the Landlord desirous of disposing the Demised Premised during the term of the Tenancy, the Landlord shall make an offer in writing to sell the same to the Tenant at such price an upon such terms and conditions the Landlord may offer to other potential purchasers generally, provided that if the Tenant shall fail to accept such offer in writing within ninety (90) days of the receipt, then the Landlord shall be at liberty to sell the Demised Premises to any other person but only at the same (or higher) price and upon the same terms and conditions as those that have been offered to the Tenant as aforesaid.

(c) Clause 14: This Agreement shall be binding upon the parties hereto as well as their heirs, executors, permitted assigns and successors in title of the parties hereto.

[21] The plaintiff argues that the first defendant is not a bona fide purchaser for value without notice as it has knowledge of the terms and clauses in TOPA, especially cl 9 and that the title it had obtained vide the said S&P is defeasible, based on the following facts:

(a) the solicitors who had prepared the S&P and who had represented the first defendant in the said S&P are common solicitors who are aware of the common knowledge and intention of the first and second defendants. The same solicitors had represented the second defendant in matters closely connected to TOPA, in that:

(i) the said solicitors had written letters dated 30 May 2003, 16 June 2003, 17 June 2003 and 3 July 2003 to the plaintiff's solicitors and to Best Wood Carving & Trading Sdn Bhd, the sub-tenants of the plaintiff to terminate the TOPA;

(ii) the said solicitors had encouraged the said sub-tenants to terminate the sub-tenancy and offered to let the land to the sub-tenant at the rental of RM5,000 although the TOPA was still valid and subsisting;

(iii) the said solicitors had through their letters dated 20 February 2004 and 6 January 2005 requested the plaintiff to rectify some alleged mutual mistake in the TOPA; and

(iv) the said solicitors had written to the plaintiff on 7 December 2004 referring to clauses in TOPA.

(b) the first defendant is the majority shareholder in the second defendant and is represented on the board of directors of the second defendant and is deemed to have knowledge of the terms and the clauses in TOPA.

(c) The S&P had been entered into at least nine months after the endorsements on the register document of title of the land in relation to the renewal of the terms of the tenancy.

(d) Pursuant to cl 9 of the TOPA, the price of RM122,179.59 should have been offered to the plaintiff first as the tenant and only if the plaintiff did not accept the said offer within 90 days, can the land be sold at the price of RM122,179.59 to a third party, including the first defendant. Whereas, in this case, the second defendant had offered the price of RM2m to the plaintiff and after the plaintiff had not accepted it, went ahead to sell the land to the first defendant at the price of RM122,179.59 without offering to sell at the same price to the plaintiff.

(e) The right of offer to purchase the land given to the plaintiff under cl 9 of the TOPA, gives the plaintiff an interest in the said land and it overrides the first defendant's interest to title over the land obtained as a result of the breach of clause 9 of the TOPA.

[22] The TOPA is a concluded agreement with due consideration. It is binding between the plaintiff and the second defendant and pursuant to cl 14 of TOPA, it is also binding on the successors in title to the second defendant, that is the first defendant. The right to be given the first option to purchase the land under cl 9 gives the plaintiff a right to the said land and such right is capable of specific performance in the event of breach of the said clause.

[23] Under cl 9 of the TOPA, during the subsistence of the tenancy, every time the second defendant wishes to sell the land, it should first give the plaintiff an offer at such price and terms as may be offered to any other potential purchaser and only if the plaintiff fails to accept such an offer within 90 days of the said offer, can the landlord sell the said land to another purchaser and that too at the same or higher price and upon the same terms as those that have been offered to the plaintiff. There is no time period attached to cl 9 and as such the issue of the said clause lapsing does not arise at all. The said offer to purchase will exist/continue as long as the tenancy is subsisting.

[24] The plaintiff is not merely a tenant but is an option holder. By virtue of being an option holder, the plaintiff has a caveatable interest on the said land. The Malaysian courts have been liberal in the interpretation of the same.

[25] In view of such blatant disregard of the plaintiff's rights as provided in TOPA and the willful breach of cl 9 which have prejudiced the plaintiff's rights, the plaintiff is entitled to commence this action for specific performance

of the said cl 9 and also for declaratory reliefs which if granted would result in the first and/or the second defendant being compelled by the court to sell and transfer the land to the plaintiff and if so the plaintiff will become the registered owner of the said land.

[26] Equitable and contractual rights under the general law, which includes the option to purchase under cl 9 are entitled to recognition and protection and the remedy granted by way of specific relief or order declaring such right against the land has the same validity as a registrable instrument. For this proposition the plaintiff relies on a passage from *Halsbury's Laws of Malaysia* Vol 8 (2003 Reissue) Malayan Law Journal at p 532:

> However, if the vendor breaches the pre-emption by giving the third party an option to buy or contracting to sell to a third party, this has the effect of causing the pre-emption to crystallize thereby converting it into an option and hence into a caveatable interest. The point of time at which the interest became caveatable is on the breach by the vendor. At this point of time an interest has been created in a third party, and the caveat may not act to give priority to the holder of the pre-emption simply because of the timing. Notice by the third party of the register would not avail the pre-emption holders' priority.

[27] The plaintiff has also referred to the cases of *Brown v Gould and Others* [1972] 1 Ch 53; *Dorothy Jones & Anor v Kim Seong Tan & 2 Ors* (1999) NSWSC 648; and *Southern Region ltd v Wellington hardware & Timber Pty Ltd (* 10917 of 2009; 2010 VSC 95) to support its submission that the right of pre-emption and the option contained in the TOPA creates an interest in the land.

[28] This, the plaintiff submits, is consistent with the spirit of the TOPA where the plaintiff was assured of security of tenure of the said land for at least nine years in view of the huge investment made by the plaintiff in purchasing the machineries from the second defendant and the large amount of capital spent in upgrading and maintaining the land together with all the building and structures erected thereon. The option to purchase under cll 9 and 3 options to renew the tenancy for a combined period of nine years were included in TOPA for that very purpose. In any event, the plaintiff argues, the interpretation of clause nine should be reserved for trial of the matter and not in this proceeding.

[29] Clause 8(a), (b) and (c) of the TOPA allows the tenancy to be renewed upon the same terms and conditions, which includes the option to purchase. Therefore, the option to purchase is applicable throughout the period of tenancy and not just to the original first term. It is erroneous to conclude that cl 9 is only valid during the first three years of the tenancy by referring to cl 5(h) and (i) of TOPA. It must be noted that cl 6 of TOPA also contains the phrase 'or any renewal thereof'. A narrow interpretation is contrary to commercial

practice. Further, cl 8 clearly states that the renewal of the tenancy will be at the rental of RM2,500 per month and upon the same terms and conditions. This clearly proves that as long as the tenancy subsists, the option to purchase under clause 9 would still be valid and applicable.

[30] The plaintiff further submits the first defendant is not a bona fide purchaser for value without notice. As such, the title of the first defendant, if any, is not indefeasible and the plaintiff is entitled to specific performance of the contractual right conferred upon it by cl 9 and to further compel the transfer of the said land by the first and/or the second defendant to it. It is an indisputable fact, argues the plaintiff, that the second defendant had sold the said land to the first defendant for only RM122,179.59 behind the plaintiff's back and that the same offer was never given to the plaintiff despite the existence of cl 9. At all material times, the first defendant, as the majority shareholder of the second defendant and being involved in the management of the second defendant, had knowledge of the TOPA, in particular cl 9 but still willfully proceeded to execute the said S&P in breach of cl 9. This has severely prejudiced the plaintiff's rights.

[31] The plaintiff's counsel has referred to the following sections in the NLC to support the plaintiff's contention that it has a proper cause of action against both defendants, namely:

(1) Section 206(3) —

> Nothing in subsection (1) shall affect the contractual operation of any transaction relating to alienated land or any interest therein.

(2) Section 340(4)(b) —

> Nothing in this section shall prejudice or prevent —
>
> (a) ...
>
> (b) The determination of any title or interest or by operation of law.

[32] The plaintiff's counsel relies on *Krishnadas a/l Achutan Nair & Ors v Maniyam a/l Samykano* [1997] 1 MLJ 94 where the Federal Court following the decisions *Yong Joo Lin & Ors v Fung Poi Fong* [1941] MLJ 63; *Ong Chat Pang & Anor v Valliappa Chettiar* [1971] 1 MLJ 224 and *Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications* [1995] 3 MLJ 665 held as per Gopal Sri Ram JCA (later FCJ) at p 100:

> ln our judgment, Parliament enacted s 340(4)(b) of the Code for the purpose of dealing with fact patterns which did not fall squarely within the other exceptions to indefeasibility which appear in s 340(2) of the Code. It was not possible, nor desirable, to predict with any degree of certainty the wide range of cases that, while

failing to come within the vitiating categories specified by the second subsection, may yet come within the scope of s 340(4)(b) …

[33] Further, the plaintiff's counsel relies on the dictum of Gill FJ (later CJM) in *Ong Chat Pang & Anor v Valliapa Chettiar* [1971] 1 MLJ 224, when applying the decision in Yong Joo Lin, His Lordship said:

> ... The term 'operation of law' in sub-s (vi), as *Das on Torres Systems in Malaya* points out at p 235, is a generic term deliberately use by the legislature to grant relief in cases where contractual or conscientious obligations (importing a breach of duty to which equity has attached its sanction) are undertaken by or imposed on the registered proprietor either at law or in equity.

[34] In addition the plaintiff submits that when the first defendant purchased the said land it took it subject to the plaintiff's tenancy which was endorsed on the title. Therefore, the plaintiff argues that whatever title the first defendant acquired as purchaser was subject to the rights of the plaintiff. In this regard reference was made to the case of *Lim Kee Gee & Ors v Chung Wah Emporium Sdn Bhd* [1985] CLJ 537 (Rep) where the court held:

> The respondents when they purchased the land took it subject to the tenancy. Whatever title they acquired as purchasers was subject to the rights of the appellants who were in possession.

THE LAW ON STRIKING OUT PLEADINGS

[35] It is only in plain and obvious cases that recourse should be had to the summary process under this rule and the summary procedure can only be adopted when it can clearly be seen that a claim is on the facts of it 'obvious unsustainable'. The courts have always been mindful that the power to dismiss an action summarily is a drastic power which ought to be exercised with utmost caution. There are high authorities for that proposition. See the cases of *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1993] 3 MLJ 36; *Mohamed Nazri Abdul Aziz v Abu Samah Hj Wahab & Ors* [2005] 8 CLJ 388; *Lian Keow Sdn Bhd v Chelliah Paramjorthy* [1982] CLJ (Rep) 522.

[36] At this point, the court is not concerned with the strength or weakness of the plaintiff's case. However weak the claim is, it ought not to be struck off summarily. See *Abdul Rahim Abdul Hamid & Ors v Perdana Merchant Bankers Bhd & Ors* [2000] 2 MLJ 417; [2000] 2 CLJ 457.

ANALYSIS OF THE FACTS AND EVIDENCE

[37] The plaintiff and defendants have raised many issues. The plaintiff

states that the cause of action accrues from breach of contract by the second defendant and that the first defendant is complicit in that breach. In the circumstance, the plaintiff argues that first defendant is not a bona fide purchaser for value without notice. The first defendant had notice of the existing TOPA and yet at its own risk went ahead to execute the S&P to transfer the land from the second defendant to the first defendant. The onus of proof is on the first defendant to prove that it is a bona fide purchaser. The plaintiff also challenges the indefeasibilty to the title obtained by the first defendant.

[38] The plaintiff's tenancy was endorsed on the register document of title. This again gives rise to issues as to whether the first defendant acquired title subject to the tenancy or otherwise as claimed by the first defendant. The validity of the option during the renewal period of the tenancy is another issue that is in dispute between the parties. There is also the issue of whether the purchase consideration of RM122,179.59 stated in the form of transfer is the only consideration paid as alleged by the plaintiff or whether the transfer was done pursuant to an internal arrangement between the shareholders of the second defendant as claimed by the first defendant. For this would determine the issue of whether the sale and transfer of the land to the first defendant was within the meaning and intent of cl 9 of TOPA or otherwise. I am of the opinion that the dictum in *Low Kian Koon & Anor v Meng Fong Realty Sdn Bhd & Anor* is not applicable here as the facts are different and in our case the tenancy is endorsed.

[39] Any order made in this action would have a direct bearing on the rights and interests of the first defendant. It is only proper that all parties who would potentially be affected by any order of the court be made parties to the action. This is more so when declaratory reliefs are sought, as in this case. It is trite law that all parties who would potentially be affected by any declaratory of the court ought to be before the court and they ought to be named as parties.

[40] The plaintiff's claim has raised serious question to be tried. The plaintiff's claim is not frivolous or vexatious nor is it an abuse of the court process. This is evident from the various affidavits filed by both parties. This is not a case where the plaintiff is bound to fail. The first defendant had filed unconditional appearance. Thereafter the first defendant filed a very lengthy defence and counterclaim. The first defendant had also filed an application for security for cost which was dismissed by the court. In that application for security for cost, the first defendant had deposed that the action would entail a lengthy trial. Obviously, this must have been based on the assessment made by the first defendant on the pleadings filed in this action. After having taken such positive steps in the proceedings it would be too late in the day for the first defendant to apply to strike out the plaintiff's claim. If at all the first defendant had thought that the plaintiff's claim is frivolous or vexatious or an abuse of

court process then the proper procedure would have been for the first defendant to file conditional appearance and move to strike. the first defendant cannot now invoke O 18 r 19 of the RHC. I have relied on the pronouncements in *Alor Janggus Soon Seng Trading Sdn Bhd & Ors v Sey Hoe Sdn Bhd & Ors* [1995] 1 MLJ 241; [1995] 1 AMR 549; *Bank of Commerce (M) Bhd v Lim Kesang & Ors* [2006] 5 CLJ 17; *Dato' Hari Menon @ Dato' T Puraharan a/l CP Ramakrishnan (suing as legal representative of DYMM Tuanku Ja'afar Ibni Almarhum Tuanku Abdul Rahman, Yang di Pertuan Besar Negeri Sembilan Darul Khusus) v Texas Encore LLC & Ors* [2005] 4 MLJ 506; [2005 2 CLJ 688; *Anchorage Mall Sdn Bhd v Irama Team (M) Sdn Bhd & Ors* [2001] 2 MLJ 520; [2001] 7 CLJ 313 in this regard.

[41] In the premise, I dismissed the first defendant's application as contained in encl 13 with cost.

First defendant's striking out application dismissed with costs.

Reported by Kohila Nesan